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Supreme Court of the United States

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LARRY KNOHL,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	5
Summary	5
I—The denial to petitioner of an evidentiary hearing to determine his competency to stand trial, assist counsel and testify in his own behalf, constituted a violation of his rights under the Fifth and Sixth Amendments	8
The Objective Medical Facts	9
The Medical Opinions	11
The actual difficulties encountered by counsel in preparation of the case presented to the court orally and in sworn affidavit	13
The court below erroneously refused to determine the relevant issues bearing on petitioner's mental and physical capacity to stand trial by means of an evidentiary hearing, which was required here, as a matter of constitutional right, and in accordance with this Court's decisions in the *Pate*, *Bishop* and *Dusky* cases	15
The court below failed to give due weight to this Court's decision in the *Pate* case, *supra*, and improperly limited the scope of due process in such matters by its application of 18 U.S.C. § 4244	18

PAGE

The decision below is in conflict with the decisions in the District Court of Columbia Circuit, which apply procedures consonant with the full requirements of due process in such matters 20

The decisional law in the habeas corpus context, exemplified by this Court's decisions in *Bishop* and *Walker, supra,* should equally apply to pretrial hearings; and to the extent that inconsistencies obtain they should be reconciled by this Court 21

Separate standards cannot be properly applied for determination of physical and mental competency as it bears upon a defendant's ability to stand trial. Doctrine applicable to determination of applications for continuance, moreover, has no relevance 22

The constitutional right to a hearing cannot be waived by agreement of counsel to submit a defendant to examination by a court-appointed doctor 23

II—Petitioner was deprived of a fair trial because of the admission in evidence of a copy of the surreptitious tape recording, absent the production in court of the original, which had never been subjected to examination for alteration or tampering and was lost as a result of the gross negligence of the Government in breach of its duty to preserve original evidence 24

Suspect nature of the tape recording and evidence as to tampering 25

The strange and unusual conduct of the FBI in failing to authenticate the tape produced and in making an adulterated copy 26

Loss of the original tape by reason of the negligent and reckless conduct of the FBI 27

PAGE

The breach by the Government of its duty to preserve original evidence and the resulting denial to petitioner of the opportunity to examine and inspect the original tape, constituted a deprivation of constitutional right .. 28

The decision of the Court of Appeals constitutes a revival of the discredited "silver platter doctrine", effectuated in the guise of the best evidence rule 30

The decision below is the first case permitting the use of a copy of a tape recording, absent a concession, where the original is not in court. It creates a new rule of general application relating to the use of eavesdropping devices which deserves the attention of this Court 32

III—The secret tape recordings were subject to discovery by petitioner, as a matter of right. The Government had an affirmative duty to disclose their existence in advance of trial 34

IV—Petitioner's surreptitiously taken statements were subject to Fourth and Fifth Amendment protection 36

Conclusion 39

APPENDIX A—Opinion of the United States Court of Appeals A1

APPENDIX B—Judgment of the United States Court of Appeals A29

APPENDIX C—Order of the United States Court of Appeals A30

APPENDIX D—Order Extending Time to File Petition for Writ of Certiorari A31

APPENDIX E—Statutory and Constitutional Provisions Involved A32

Cases Cited

PAGE

Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842, 846 (4th Cir., 1964) 29

Berger v. New York, 388 U. S. 41, 56 (1967) 2, 3, 7, 8, 24, 37

Bishop v. U. S., 350 U. S. 961 (1956) ..2, 5, 6, 15, 17, 21, 22

Canady v. U. S., 351 F. 2d 817 (D. C. Cir., 1965) 20

Catalano v. U. S., 298 F. 2d 616 (2nd Cir., 1962) 15

Cicenia v. La Gay, 357 U. S. 504, 511 (1958) 35

Dennis v. U. S., 384 U. S. 855, 870 (1966) 7, 35, 36

Dusky v. U. S., 362 U. S. 402 (1960) 5, 15, 17

Gouled v. U. S., 255 U. S. 298 (1921) 38

Johns v. U. S., 323 F. 2d 421 n. 2 (5th Cir., 1963) ... 32

Kenner v. U. S., 286 F. 2d 208 (8th Cir., 1950) 20

Monroe v. U. S., 234 F. 2d 49, 56 (D. C. Cir., 1956) .. 32

Pate v. Robinson, 383 U. S. 375 (1965) 5, 6, 15. 17, 19, 20, 22, 23

People v. King, 225 P. 2d 950, 101 Cal. Ap. 2d 500 (1950) 29

Rees v. Payton, 384 U. S. 312 (1966) 15

Shores v. U. S., 174 F. 2d 838, 843 (8th Cir., 1949) ... 35

Sylvania Electric Products, Inc. v. Flanagan, 352 F. 2d 1005, 1008 (1st Cir., 1965) 29, 30

Thomas v. Cunningham, 313 F. 2d 934 (4th Cir., 1962) 15

Thomas v. U. S., 343 F. 2d 49, 53 (9th Cir., 1965) 29

Toho Bussan Kaisha Ltd. v. American Pres. Lines, Ltd., 265 F. 2d 418, 423 (2d Cir., 1959) 30

Townsend v. Sain, 372 U. S. 293 (1962) 15, 19

PAGE

U. S. v. Alexander, 326 F. 2d 736, 742 (4th Cir., 1964) 31

U. S. v. Consolidated Laundries, 291 F. 2d 563 (2nd Cir., 1961) 28, 29, 30

U. S. v. Madda, 345 F. 2d 400, 402-3 (7th Cir., 1965) 32

U. S. v. Hall, 342 F. 2d 849, 852 (4th Cir., 1965) 32

U. S. v. Hayman, 342 U. S. 205 (1952) 15, 21

U. S. v. Heath, 147 F. Supp. 877 (D. Hawaii 1957), aff'd 260 F. 2d 623 (9th Cir., 1958) 29, 30

U. S. v. Manton, 107 F. 2d 834, 835 (1939) 31

U. S. v. Murray, 297 F. 2d 812, 820 (2nd Cir.), cert. denied 369 U. S. 828 (1962) 35

U. S. v. Nolte, 39 F.R.D. 359 (D.C.N.D. Cal., 1965) .. 35

Walker v. Johnston, 312 U. S. 275 (1941) 2, 6, 15, 21

Westbrook v. Arizona, 384 U. S. 150 (1966) 15

Whalen v. U. S., 346 F. 2d 812, 815 (D. C. Cir.), cert. den. 382 U. S. 862 (1965) 20

Wider v. U. S., 348 F. 2d 358 (D. C. Cir., 1965) 20

STATUTES

28 U.S.C. § 1254(1) 1

18 U.S.C. § 1503 3

18 U.S.C. § 4244 ..... 3, 5, 18, 19, 20

D. C. Code § 24-301(a) and (b) 3, 20

28 U.S.C. § 2255 ..... 3, 21

Rules and Regulations

PAGE

Federal Rule of Criminal Procedure,

Rule 16(a) 3, 7, 34

Rule 7(f) 34

United States Constitution

Fourth Amendment 3, 36, 37, 38

Fifth Amendment 2, 3, 8, 36, 38

Sixth Amendment 2, 3, 8

Miscellaneous

Annotation, 58 ALR 2d 1024, 1044 32

Supreme Court of the United States

LARRY KNOHL,

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against

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Larry Knohl, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered June 22, 1967. The opinion of the Court of Appeals is printed in the Appendix to this petition (A1-28).*

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1967 (A29) and a timely petition for a rehearing was denied on July 17, 1967 (A30). The time to file this petition was extended from August 16, 1967 to September 15, 1967, by order of Mr. Justice Fortas, dated August 11, 1967 (A31).

The jurisdiction of this Court is invoked under 28 U. S.C. § 1254(1).

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* References to the Appendix will be preceded by the letter "A". All references without such designation will be to petitioner's Appendix in the Court of Appeals.

Questions Presented

1. Whether a defendant with conceded brain damage and neurologic deficits after a cerebral stroke, is entitled, as a matter of constitutional right, to an evidentiary hearing on the issue of his ability to stand trial and adequately assist his counsel in the preparation and trial of the case, including his ability to testify on his own behalf (Fifth and Sixth Amendments).

2. Whether the rule of this Court that an evidentiary hearing is required on writs of habeas corpus relating to a prisoner after conviction to determine his competency to stand trial applies equally to a defendant before trial (*Bishop* v. *U. S.*, 350 U. S. 961 [1956]; *Walker* v. *Johnston*, 312 U. S. 275 [1941]).

3. Whether an evidentiary hearing is required to determine ability to stand trial where the defendant is suffering from concededly serious illness and medical opinion is in conflict.

4. Whether a copy of a surreptitiously taken tape recording may be admitted in evidence without production of the original, in view of the known methods of altering and tampering with such devices, which can only be exposed by examination of the original; and whether the growing use of secret eavesdropping devices does not require such a minimum standard of trustworthiness.

5. Whether the minimum standard should not, in any event, require the Government at least to test the original tape for tampering and alteration to insure "the fairness of procedures" in accordance with the policy announced in *Berger* v. *New York* (388 U. S. 41, 56 [1967]).

6. Whether the Government has a duty to obtain and keep, by process or otherwise, for inspection by the defendant as to alteration or tampering, the original of a sur-

reptitious tape recording; and whether failure to perform its duty to preserve original evidence, recklessly and negligently, resulting in the loss of the original, precludes the introduction of a purported copy in evidence.

7. Whether the Government, consistent with the purpose of the new Rule 16(a), Federal Rules of Criminal Procedure, had the duty to disclose in advance of trial and make available for discovery by petitioner a secret tape recording of conversations of the petitioner; and whether such discovery by petitioner was a matter of right.

8. Whether under *Berger* v. *New York, supra,* a search warrant is not required for eavesdropping in a federal criminal investigation; whether the Fifth Amendment rights of the petitioner were not also violated in the circumstances set forth herein; and whether the status, as an agent of the Government, of a person making the secret recording should not have been submitted for determination to the trial jury.

Statutes Involved

The statute involved in the indictment is 18 U. S. C. § 1503. The statutes relevant to the issues presented herein are 18 U. S. C. § 4244, D. C. Code § 24-301(a) and (b), 28 U. S. C. § 2255 and Federal Rules of Criminal Procedure, Rule 16(a). The constitutional provisions involved are the Fourth, Fifth and Sixth Amendments to the United States Constitution. All are printed in the Appendix hereto (A32-38).

Statement

Petitioner was convicted in the United States District Court for the Southern District of New York, upon a jury verdict of guilty, of obstructing justice in violation of 18 U.S.C. § 1503, and was sentenced to the maximum prison term of five years. The specific charge, as alleged in the

indictment (5a) was that he endeavored to influence the testimony of one Mrs. Kay B. Fuller, a witness under subpoena to appear before a grand jury. The pertinent facts relating to the alleged corrupt endeavor may be briefly set forth as follows:

It was claimed that during the period August 6 through August 24, 1965, petitioner sought to use the said Mrs. Fuller to cash six United States treasury bills, allegedly stolen, each being in the amount of $100,000; and then have her deny before a grand jury that petitioner was the source of the bills.

Mrs. Fuller testified as to discussions with petitioner respecting the proposed transactions by her with the treasury bills. In particular, she spoke of mentioning to petitioner the possibility that she might have to justify such a large amount to the bank where the transactions were to be effected; that petitioner allegedly told her to say that one Kirby—her former employer and associate—gave them to her; that she told petitioner she could not do that because Kirby had been dead for a long time and six-month treasury bills were involved; that petitioner then allegedly asked her if she knew any other people who died recently; and that she then brought up the name of one Cy O'Neil, telling petitioner that she could tell the bank that she got them from O'Neil in the event they questioned her (122a).

Thereafter, Mrs. Fuller proceeded to cash certain of the treasury bills and make loans against others at the Chemical and Barclay Banks in New York City. On August 24, 1965, however, she was confronted by the FBI who informed her that the treasury bills were stolen (139a-40a, 256a-59a); and on the next day, August 25, she was served with a subpoena to appear before a grand jury which was investigating the theft of the treasury bills (143a).

A conference, crucial in the posture of the Government's case, took place on the day that the subpoena was served in Mrs. Fuller's apartment between herself, petitioner, and one Brodsky, an attorney whom she had retained to repre-

sent her in the matter. The highlight of this conference was that petitioner allegedly told Mrs. Fuller to tell the grand jury that she got the treasury bills from O'Neil and not to change her testimony—that a dead man can tell no tales (145a).

Mrs. Fuller made several surreptitious tape recordings of conversations with petitioner to which a substantial part of the trial was devoted. The principal recording—constituting the high point of the trial (introduced in evidence as Exhibit 48 and referred to as the "Brodsky" tape)—pertained to the conference of August 25 between Mrs. Fuller, Brodsky and petitioner (152a).

Reasons for Granting the Writ

Summary

1. The standard as to when an evidentiary hearing must be granted for determination of a defendant's mental and physical capacity to assist counsel, to stand trial and to testify in his own behalf require clarification and formal pronouncement by this Court for the guidance of the lower federal courts. We maintain that such a hearing is constitutionally required in advance of trial unless the application therefor is patently frivolous. This standard emerges from the decisions of this Court in *Pate* v. *Robinson* (383 U. S. 375 [1965]), *Bishop* v. *U. S.* (350 U. S. 961 [1956]), and *Dusky* v. *U. S.* (362 U. S. 402 [1960]), among others, as to which the court below failed to give due weight.

2. With particular reference to the decision in *Pate* v. *Robinson, supra,* the determination below severely circumscribes a defendant's constitutional right in holding that the procedures under 18 U.S.C. § 4244 (which precludes an evidentiary hearing in the event the court-appointed physician issues a certificate of competency) constitute the ex-

clusive remedy in the federal courts for determination of such matters. If the court below is correct, § 4244 is unconstitutional.

3. An anomalous distinction has been drawn between habeas corpus applications for determination of competency, where in accordance with the decisions of this Court (e.g., *Bishop* v. *U. S., supra,* and *Walker* v. *Johnston, supra*) a hearing must be granted unless the application is patently frivolous, and pre-trial applications with respect to competency hearings. The distinction between the standards for determination of such matter before trial and when a defendant is in custody after conviction should not be perpetuated.

4. A conflict exists with the decisions in the District of Columbia Circuit, which hold that an evidentiary hearing must be granted as to competency to stand trial if counsel for defendant or the Government objects to a court-appointed physician's finding of competency. We maintain that the procedure which obtains in the District of Columbia Circuit is constitutionally required.

5. The court below has distinguished between mental and physical competency to stand trial, applying different standards with respect to the determination of such issues. The distinction is artificial and can only create confusion and difficulty in the determination of such matters, leading to a denial of a defendant's constitutional rights.

6. A unique doctrine has also been applied below, which we believe is constitutionally unsound, in that it was held, contrary to the determination by this Court in *Pate* v. *Robinson, supra,* that a defendant's right to an evidentiary hearing on his mental and physical competency to stand trial may be waived where counsel merely consents, without more, to submit the defendant to physical examination by a court-appointed doctor.

7. Questions of first impression as to the standards required for insuring the "fairness of procedures" (*Berger* v. *New York, supra*), in connection with the admission in evidence of surreptitiously made tape recordings are presented for review. We maintain that a minimum standard, requiring the Government to produce the original tape recording in court, or at the very least, to test the original tape for tampering and alteration, should be imposed.

8. The decision below permitting the use of a purported copy of the surreptitious tape recording without the production of the original goes beyond the prior determinations in the Fourth, Fifth, Seventh and District of Columbia Circuits, where copies of tapes have been admitted, absent a concession as to authenticity, only when the original has been produced in court.

9. The grossly negligent conduct of the FBI in connection with the loss of the original tape recording, completely preventing its examination by petitioner, indicates the need for promulgation of a rule by this Court, requiring the Government to preserve original evidence by means of process or otherwise.

10. The court below has essentially revived the discredited "silver platter" doctrine by overlooking the fault of the Government officials in connection with the loss of original evidence.

11. Clarification of the new Federal Rule 16(a) is required for the guidance of the lower federal courts in two material respects: (a) The court below held that discovery of a defendant's statement is discretionary, contrary to the purport of the new rule and the policy expressed by this Court in *Dennis* v. *U. S.* (384 U. S. 855, 870 [1966]). (b) In dealing with surreptitious tape recordings, the existence of which a defendant cannot conceivably know before trial, a duty must be imposed upon the Government

at least to disclose its possession before trial so as to enable application for discovery by the defendant.

12. The reach of this Court's decision in *Berger* v. *New York, supra,* requires clarification. We maintain that, consistent therewith, a defendant's statements surreptitiously taken are now subject to Fourth Amendment protection, and, in this case, to Fifth Amendment protection as well.

ARGUMENT

I

The denial to petitioner of an evidentiary hearing to determine his competency to stand trial, assist counsel and testify in his own behalf, constituted a violation of his rights under the Fifth and Sixth Amendments.

This case in its pre-trial stages came on before no less than five Federal District Judges on at least eight separate occasions. On virtually each occasion counsel for petitioner emphasized petitioner's inability to stand trial and effectively assist counsel in preparation because of his debilitated condition, resulting from a severe stroke. Several applications for adjournment of the trial by reason of petitioner's condition were made, as well as application for a hearing on the issue. These applications were made both orally (9a-19a, 25a, 30a-35a, 49a, 97a-112a) and by way of formal motion (42a-83a). Petitioner relied upon the objective medical facts adduced as to his condition which took the form of several medical reports by eminent physicians and specialists who were treating petitioner for his various ailments (70a-78a, 82a-83a, 114a), affidavit by petitioner himself (27a-29a), as well as counsel's first-hand experience in attempting to prepare for trial under the circumstances, set forth both orally and in affidavit under oath (42a-54a).

No less than four District Judges (Frankel [34a-35a], Croake [49a], Herlands [96a] and Tyler [100a]) indicated that a plenary hearing was indicated on the issue, but deferred ultimate determination of the matter to the trial judge. Thus, Judge Frankel commented that

> "We discussed it in the past and we tended to agree that it might be a subject that would require an actual evidentiary hearing." (34a-35a)

Judge Herlands wrote:

> "In denying the present application, the Court is mindful of the fact that the trial judge possesses discretion to decide whether or not there should be a hearing of live medical witnesses in order to ascertain more precisely at the time of actual trial the state of defendant's health in relation to his ability to stand trial." (96a)

The trial judge, however, when the matter came before him, peremptorily refused to do so and instead ordered petitioner to trial. He ruled that

> "there has been enough medical testimony so far and Judge Herlands has considered the problem and it is for my discretion from here on in. I have exercised it and set the trial date for tomorrow, July 6th." (112a)

The Objective Medical Facts

There is no dispute on this record that petitioner—in the words of Judge Herlands, denying his formal application for a hearing (96a)—was a "very sick man" at the time of trial. The objective medical facts culled from the various medical reports presented to the court below show the following as to petitioner's condition:

1. *Brain damage:* Petitioner having suffered a major stroke approximately 6 months prior to the indictment in

this proceeding, sustained brain damage, the actual condition being variously described by the medical experts as "cerebral arteriosclerosis with a thrombotic lesion on the left side of the brain" (59a); "severe vascular disease of the brain, the eyes and the heart" (82a); "right hemiplegia" (74a) and "cerebral disease" (57a) with "neurologic deficits" (94a).

2. *Paralysis and general physical disability:* The right side of petitioner's body, including his face, was paralyzed. He was confined to a wheelchair with his arm in a sling and leg in a brace (28a, 59a, 71a, 74a). In an effort to ameliorate the effects of the paralysis, petitioner was undergoing physiotherapy at the Rusk Institute at the time of trial (65a).

3. *Hypertension and diabetes:* Petitioner was also suffering from a long-standing condition of dangerously high blood pressure, coupled with diabetes. The hypertension was the very condition which precipitated the major stroke; and at all pre-trial stages through the time of trial, his blood pressure was running at levels (up to 240/140) which were equal to those at the time he actually suffered the stroke (27a, 59a, 72a-76a). Apart from the very dangerous ramifications of the condition, rendering him susceptible to another stroke, petitioner was also inflicted with headache and dizziness (79a, 83a).

4. *Severe speech impediment:* A further result of the stroke with its attendant paralysis was a severe articulative difficulty under which petitioner labored, being characterized as "dysarthria", which substantially interfered with his ability to speak. The result was that he was constrained to talk "with his mouth twisted to the side" and his speech was slowed and slurred (57a, 65a, 74a, 105a). Petitioner was, at the very time of trial, undergoing speech training to help rectify the condition (65a).

5. *Severe pain and heavy medication:* Petitioner's condition gave rise to substantial pain, particularly intensive in his arm and leg, which constantly harassed him (25a-26a, 28a). In order to reduce the pain, and to help control the severe hypertension, as well as his other infirmities, petitioner was constrained to take heavy dosages of medication daily, consisting of no less than 26 pills each day, including orinase, cortisone, darvan, aspirins, blood pressure pills and tranquilizers (27a-28a, 80a, 90a). The effect of these heavy doses of medication, coupled with the pain, was to further impair petitioner's faculties, rendering him "woozy most of the time", as he stated in his affidavit to the court (28a).

The Medical Opinions

Petitioner was examined by two Court-appointed physicians, Doctors Brock and Clark. Their reports, printed in their entirety in the appendix below (56a-63a, 64a-69a, 84a-95a), admit to the objective medical circumstances hereinabove outlined. The first examination by Dr. Brock was in March 1966 in connection with another matter pending in the Eastern District of New York. Dr. Brock maintained in a conclusory manner, without providing significant basis for his conclusion, in the course of his review and recitation of petitioner's medical infirmities, that he was allegedly well-oriented, alert and responsive with a seeming absence of reduction in his ordinary intellectual capacities (57a, 59a). He concluded, however, that petitioner was unable to stand trial and suggested re-examination in 6 months, doubting, however, that there would even be sufficient improvement at that time to permit him to stand trial (59a).

Only two months later, however, Dr. Brock reversed his position and determined that petitioner, who appeared alert, responsive and cogent (65a) was physically able to stand trial, cautioning, however, that a special nurse or doctor be present in court during trial (69a).

After Dr. Brock and two other doctors indicated an inability to make a final decision, Dr. Clark (who had been recommended by Dr. Brock [50a, 106a]) examined the petitioner (76a, 77a, 81a). His report concerning petitioner's "physical fitness to stand trial in the immediate future" (92a), concluded quite inconsistently in the face of the extensive recitation of his general condition in the report, that his state of health did not preclude his going to trial. Petitioner, in his opinion, was not likely to improve and that if any risk existed it "would in time become greater rather than lesser" (95a).

The medical reports submitted below by petitioner were from six physicians who had first-hand experience in the treatment of petitioner, namely, Doctors Dolger, Frieden, Kershner, Levitt, Nott and Myers. They all substantiated the objective medical circumstances hereinabove set forth. Their opinions emphasized the severe risks to which petitioner was exposed and indicated the limitations imposed upon him by reason of his condition as to consultation with counsel, preparation for trial and actual appearance at trial (70a-78a, 82a-83a, 114a).

Thus, to quote relevant portions of their reports, it was reported that "any undue excitement would result in serious damage" (Dolger, 71a); "absolute bed rest" was required or petitioner was likely to "suffer another stroke" (Kershner, 73a); that any "undue emotional stress can be detrimental at this time" (Frieden, 75a); that any "untoward stress or excitement could provoke serious additional damage" (Levitt, 82a); and that "rest at home" was required, it being "hazardous" for petitioner "to travel to New York" (Nott, 21a).

Dr. Myers' report, based upon his examination of petitioner and his medical history, addressed itself specifically to the issue and he rendered the opinion that:

> "[Petitioner's] mental and physical condition makes proper consultation with his counsel in the prepara-

tion of his case extremely difficult and very likely fruitless." (114a)

This opinion by Dr. Myers was reduced to writing four days before the actual commencement of trial and was accepted by the trial judge as if Dr. Myers had testified personally (112a).*

The actual difficulties encountered by counsel in preparation of the case presented to the court orally and in sworn affidavit

Trial counsel for petitioner recited to the court on several occasions his first-hand experiences in attempting to consult with petitioner and prepare the case for trial; and further submitted his sworn affidavit to the court recounting these general difficulties upon the formal motion for an adjournment and a hearing on the issue (See e.g., 9a-19a, 25a-26a, 30a-36a, 42a-43a, 47a-52a, 98a-101a, 102a-107a).

Counsel, among others, stressed the following difficulties: that in view of petitioner's condition he was unable to speak with him and interrogate him as he would normally do in the preparation of a case; that there is a limited time he can spend with petitioner in a day, in view of his condition and "with a degree of safety for him"; that he finds that he is able to talk with him for only 30 minutes at a time, and he gets excited—in short, he finds it "almost impossible" (10a-11a, 17a); that peti-

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* The court below, unfairly, we believe, criticized Dr. Myers' opinion as "conclusory" (A13-14). This is to ignore the fact that he actually examined petitioner and made precise findings; and that his ultimate opinion was hardly more conclusory than Dr. Clark's, upon which the court relied, or Dr. Brock's, for each was dealing with an ultimate fact. Significantly moreover, Dr. Myers, unlike Drs. Clark and Brock, addressed himself to the precise question at issue.

tioner was "unable to properly and fairly assist [him] in the preparation of this case" (25a); that petitioner's "mental and physical condition is such as to render it impossible for him to consult with counsel for any considerable period of time in order to prepare his defense"; that "he is unable to assist counsel because of his physical limitations and his mental condition, in the investigation and development of the facts and circumstances which would make it possible for him to establish his innocence" (42a-43a); that the problems of trial preparation and consultation with petitioner has been "an almost impossible task" (52a); that specifically, petitioner had been unable to travel to counsel's office in Brooklyn during the hot weather; that when he has come, counsel found "that his memory was very poor, that he was unable to stay for any great length of time" (52a); that petitioner has not been able properly to cooperate and has been unable to furnish the necessary information for counsel to prepare the case (52a); that counsel has "not been able to consult with [petitioner] more than a few times"; that as a result of petitioner's condition he was advised by his doctors not to travel to New York; that the stroke affected petitioner's speech in that although the condition is improving he is constrained to "talk with his mouth twisted to the side"; and that, as a general matter, "his stroke has almost barred his participation with [counsel] in the preparation" of the case (105a). Counsel further stressed that particularly in view of the terrific heat at the time, petitioner could not possibly be required to "sit in the courtroom and then be asked to spend several hours a day with me after court to prepare the case" (107a).

The court below erroneously refused to determine the relevant issues bearing on petitioner's mental and physical capacity to stand trial by means of an evidentiary hearing, which was required here, as a matter of constitutional right, and in accordance with this Court's decisions in the *Pate*, *Bishop* and *Dusky* cases.

A bona fide dispute on competency to stand trial and assist counsel, like any other disputed question of fact, can only be resolved by an evidentiary hearing. The decisions of this Court accordingly hold that, absent frivolity, where facts are called to the trial court's attention, indicating that the defendant may be mentally and physically unable to effectively defend against the charge and assist counsel, the Constitution requires a plenary hearing for determination of the issues presented. The matter cannot be resolved upon affidavit or conflicting medical reports without the benefit of live testimony, including expert witnesses, subject to cross-examination.

This we submit is the teaching of the decision by this Court in *Pate* v. *Robinson* (383 U. S. 375 [1966]; See also, *Rees* v. *Peyton*, 384 U. S. 312 [1966]; *Westbrook* v. *Arizona*, 384 U. S. 150 [1966]), as well as *Bishop* v. *U. S.* (350 U. S. 961 [1956]) and the long line of authority comporting with *Bishop* in the analogous habeas corpus context (See e.g., *Walker* v. *Johnston*, 312 U. S. 275 [1947]; *U. S.* v. *Hayman*, 342 U. S. 205 [1952]; *Thomas* v. *Cunningham*, 313 F. 2d 934 [4th Cir., 1962]; *Catalano* v. *U. S.*, 298 F. 2d 616 [2nd Cir., 1962] *Cf. Townsend* v. *Sain*, 372 U. S. 293 [1962]), mandating a hearing on the issues as an absolute matter of right, unless the application therefor is patently frivolous.

It is further submitted, with particular reference to this Court's determination in *Dusky* v. *U. S.* (362 U. S. 402 [1960]), and under the circumstances of the case at bar, that the determination constitutionally required by means

of the evidentiary hearing before trial must embrace affirmative findings that the defendant had sufficient mental and physical ability, as well as adequate opportunity in light of his condition, to consult with counsel in advance of trial and during the trial; and that in light of his over-all condition, including the severe speech impediment under which he labored, he was capable of taking the stand to testify if he so desired.

Instead of conducting a hearing with cross-examination, the District Court relied on a letter from Dr. Clark, and an *ex parte* telephone conversation between Dr. Clark and Judge Herlands (96a, 112a). While it does not appear that reliance was placed thereon by the District Court, the Court of Appeals (A13-14) tended to justify the denial of a hearing also by reference to the report of Dr. Brock.

These doctors, however, never came to grips with the issues requiring determination in advance of trial. The principal orientation of their reports was petitioner's physical fitness, without more, to stand trial. To conclude as Doctors Brock and Clark essentially did that the patient will live through a two-week trial if he were to do nothing but sit "mutely" in court, hardly comports with accepted constitutional notions of proper trial procedures in the federal courts and a defendant's constitutional rights.

In terms of the specific issues requiring determination, neither Doctor Brock nor Clark addressed themselves specifically to whether petitioner was mentally and physically capable, and whether he had *adequate opportunity* in light of the general physical limitations to which he was subjected, to adequately assist counsel in the preparation required in advance of trial. We hardly need emphasize the intensive nature of pre-trial preparation of a criminal case. Doctors Brock and Clark did not even mention the matter of pre-trial preparation—let alone indicate an awareness of the nature of the participation therein required of a criminal defendant.

Nor did these doctors adequately address themselves to the issue of whether petitioner, in light of his many infirmities, could effectively assist in his defense during the actual course of trial, considering the lengthy hours daily to which a defendant on trial is subjected, which extend far beyond the court day and into the night. Their reports hardly reflect an awareness of these circumstances or the fact that under our system of continuous trial days the lawyer and defendant, if he is to assist his lawyer properly, must be able to start a whole new day after the court day is done; that there is hardly a strain known to man more severe than the trial of a criminal case.

The opinions of Doctors Brock and Clark, moreover, are completely barren of comment on the issue of whether petitioner was able to effectively testify in his own behalf during the course of trial in light of his mental and physical condition, generally, and the severe speech impediment under which he was laboring, in particular. On the basis of their reports, they rather blithely presume that a man whose speech is slowed and slurred, constrained to talk with his "mouth twisted to the side", can effectively communicate with a jury—let alone withstand the inevitable rigors of cross-examination in light of his general debilitated condition.

We believe it is apparent, therefore, that the opinions of the court-appointed doctors evidence a total lack of appreciation of the criteria to be utilized in determining whether a defendant is able to stand trial. This points up the absolute necessity of an evidentiary hearing on the issue and the error of the courts below, in contravention of prevailing law as reflected in the decisions of this Court in *Pate, Bishop* and *Dusky, supra,* in denying a hearing to petitioner.

The wisdom of the rule is self-evident, since the test must be a judicial test, not a medical test based upon self-conceived standards of the reporting court-appointed

doctors as to what they believe are the relevant criteria in determining ability of a defendant to stand trial. It is for the court, not the doctor, to determine the ultimate issue of the defendant's capacity to stand trial. The standards used by the doctor are not only obscure but undoubtedly differ from physician to physician. Where serious illness, involving brain damage (to mention but one circumstance) is conceded by all the medical opinions, the doctors must then be oriented toward standards of determining ability to assist counsel and to testify in the defendant's own behalf. Logically, in the absence of specific instructions from the court to the examining physicians, the only method useful for the ultimate judicial determination is that of a hearing with cross-examination. In this way only can the criteria for the opinions used by the medical experts be determined and appropriate resolution of the questions presented be had.

The court below failed to give due weight to this Court's decision in the *Pate* case, *supra*, and improperly limited the scope of due process in such matters by its application of 18 U.S.C. § 4244

With reference to *Pate, supra,* the Court of Appeals emphasized that a state court decision was involved; and held that the determination by this Court therein "did not create any new federal right or a new procedure for applying for a hearing in the federal courts on the issue of mental competency to stand trial;" and that in the federal courts, 18 U.S.C. § 4244, enacted "in aid" of "due process", was the "exclusive procedure" to be followed (A12).

This very question as to definition of the scope of § 4244 and whether it satisfies due process requirements is one of recurring importance in the administration of federal criminal justice and commends itself for review by this Court.

Pate held that the defendant was "constitutionally entitled to a hearing" (383 U. S. at p. 377). No significance can be accorded to the fact that the case came up from a state court. *Townsend* v. *Sain* (372 U. S. 293 [1962]) is significant in this regard. This Court there set forth the circumstances under which a plenary evidentiary hearing was mandatory in the federal habeas corpus review of claims by state prisoners of unconstitutional detention. Chief Justice Warren wrote, in relevant part, that where "the facts are in dispute", the federal court on habeas

> "*must* hold an evidentiary hearing if the habeas applicant did not receive a *full and fair evidentiary hearing* in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court trier of fact has after a *full hearing reliably found the relevant facts.*" (372 U. S. at p. 312; emphasis supplied).

If a state court is constitutionally bound to such standards for evidentiary hearings in matters involving claims of constitutional right, we can hardly expect less of a federal tribunal acting as a court of first instance.

Furthermore, while § 4244 may have been envisaged as being "in aid" of "due process" when enacted by Congress, it can hardly serve to define the outer limit of constitutional right; and to the extent that it may circumscribe the right of due process, as in its application to the situation at bar (providing as it does for a hearing only if the *ex parte* report of the court-appointed psychiatrist makes a finding of "incompetency"), it must be regarded as unconstitutional.

The decision below is in conflict with the decisions in the District of Columbia Circuit, which apply procedures consonant with the full requirements of due process in such matters

We submit, moreover, that the full reach of due process is rather more nearly exemplified by the procedure which obtains in the District of Columbia Circuit. The Court of Appeals in that Circuit, applying D. C. Code § 24-301(a), the counterpart of 18 U.S.C. § 4244, holds that if the "accused or the Government objects" to a certification of competency, "a hearing must be held to determine competency" (*Whalem* v. *U. S.*, 346 F. 2d 812, 815 [D. C. Cir.], cert. den. 382 U. S. 862 [1965]; *Wider* v. *U. S.*, 348 F. 2d 358 [D. C. Cir., 1965]; *Canady* v. *U. S.*, 351 F. 2d 817 [D. C. Cir., 1965]; see also, *Kenner* v. *U. S.*, 286 F. 2d 208 [8th Cir., 1950]).

The statutory language of D. C. Code § 24-301(a), like 18 U.S.C. § 4244, provides for a hearing on the issue of competency only in the event a defendant is certified to be incompetent by the court-appointed physicians. D. C. Code § 24-301(b), treating with cases of the restoration to mental competency of one previously certified as incompetent, provides for a hearing in the event "the accused or the Government objects". The District of Columbia Court of Appeals holds, however, that this standard is not limited to restoration cases, but equally applies to a certification of competency in the first instance—notwithstanding the restrictive language of § 24-301(a).

We submit that the foregoing approach which prevails in the District of Columbia is one of due process, as required by *Pate, supra,* rather than of statutory interpretation.

This apparent conflict between the decisions of the Court of Appeals in the District of Columbia Circuit and the standards which there control, and the approach of the Second Circuit Court of Appeals, adds a further dimension to this case, indicating the importance of review by this Court.

The decisional law in the habeas corpus context, exemplified by this Court's decisions in *Bishop* and *Walker, supra,* should equally apply to pre-trial hearings; and to the extent that inconsistencies obtain they should be reconciled by this Court

The standards obtaining in the District of Columbia are not unlike those applied in the habeas corpus context (*Bishop* v. *U. S.* and *Walker* v. *Johnston, supra;* see also cases cited p. 15, *supra*). This Court held in *Walker* v. *Johnston, supra,* that where a prisoner is in custody he must get an evidentiary hearing on a writ of habeas corpus to determine ability to stand trial and competence, unless his claim is frivolous. There should be no distinction between the constitutional requirements in determining a writ of habeas corpus where the defendant is in custody and of determining the very same issue if it arises before trial. Yet, if the decision at bar stands, such an anomalous distinction will obtain in the Second Circuit.*

Significantly, the court below did not state that petitioner's claim as to mental and physical incapacity was frivolous. Such a finding would be impossible in the circumstances at bar. The very conceded facts—consisting of hardly more than the objective medical circumstances pertaining to petitioner's condition, as outlined above (pp. 9-11)—clearly demonstrate a total absence of frivolity.

Furthermore, the inability of the Government doctors to agree in their conclusions with the doctors who were treating petitioner, standing alone, still evidences a difference of opinion which automatically takes the case out of the realm of the frivolous. Moreover, four District Judges

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* Although this Court has not been required specifically to pass upon this point in terms of constitutional doctrine (See *U. S.* v. *Hayman,* 342 U. S. 205, 223 [1952]), we respectfully suggest that a statute more restrictive in scope than 28 U.S.C. § 2255 could hardly pass the test of due process. If § 2255 meets the requirement of constitutional due process, the absence of a similar statutory provision and the refusal of a hearing in our case, do not. A statute is not necessary to vindicate a constitutional right.

thought a hearing might be required. No District Judge made the statement (or assumed) that the claim was "frivolous". Each of them thought that the matter should be determined by the trial judge who then failed to properly pass on the issue.

To the extent that the "frivolous" standard is relevant, as we think it is, the failure of the court below to give it effect provides a substantial basis for review herein. Contrariwise, if the Court of Appeals' failure to apply the standard may be deemed appropriate under the posture of existing law—with the result that separate standards apply for one moving after trial while in custody and one moving before trial—examination of this distinction and its perpetuation is an important question which warrants consideration by this Court.

Separate standards cannot be properly applied for determination of physical and mental competency as it bears upon a defendant's ability to stand trial. Doctrine applicable to determination of applications for continuance, moreover, has no relevance

A further distinction was drawn below, which we submit is also untenable and should not be perpetuated. The issue of ability to stand trial was compartmentalized in terms of mental incapacity (A10) and physical incapacity (A14), with different standards being held applicable to each.

The distinction, we submit, is artificial; and but further points up the necessity for imposing upon the lower courts a general due process approach as indicated in *Pate, supra,* with uniform standards, as promulgated in *Bishop* and *Walker, supra.* These standards must apply equally to mental and physical incapacity insofar as it affects the ability of a defendant to effectively assist counsel before and during trial, and its bearing upon his ability to testify. The physical and mental aspects of the defendant's condition coalesce.

Surely, one who is immobile, and by reason thereof lacks the opportunity to consult with counsel; or who, as a result of a debilitating condition is limited to extremely short periods of consultation, is no less affected than one who cannot communicate fully with counsel because of mental incapacity. Similarly, one who is laboring under a severe speech impediment, which prevents cogent articulation and proper demeanor on the witness stand, is under no less a disability than one who is mentally unable to testify. The constitutional ramifications are the same. In either case, where the claim is not frivolous, a plenary hearing to determine the issue is required.

The constitutional right to a hearing cannot be waived by agreement of counsel to submit a defendant to examination by a court-appointed doctor

The position of the Court of Appeals on waiver (A16), we respectfully submit, is unsupported either in the record or in precedent. Acquiescence by counsel in the selection of a particular doctor to examine the petitioner hardly carries with it blind antecedent consent to the findings and waiver of challenge thereto—let alone deprival of the petitioner's constitutional right to an evidentiary hearing as a matter of due process. But here, moreover, counsel kept asking for a hearing (34a, 35a, 51a, 142a) which is inconsistent with the very concept of a waiver. One is not voluntarily waiving the very thing one is asking for.

In fact, even if counsel had expressly stipulated to waive an evidentiary hearing on competency, or ability to assist counsel, we are told by *Pate* v. *Robinson, supra,* that such a fundamental right cannot be waived (383 U. S. at p. 384).

II

Petitioner was deprived of a fair trial because of the admission in evidence of a copy of the surreptitious tape recording, absent the production in court of the original, which had never been subjected to examination for alteration or tampering and was lost as a result of the gross negligence of the Government in breach of its duty to preserve original evidence.

The crucial evidence in this case upon which the conviction of petitioner stands, was the so-called "Brodsky" tape (Exhibit 48)—being the tape recording of the conversation held on August 25 in Mrs. Fuller's apartment between Knohl, Brodsky and Fuller (152a). This tape was but a copy, never properly authenticated, of an alleged original recording which was never produced and allegedly lost or destroyed as a direct result of the conduct of the Government and its agents. The absent original tape, moreover, was exceedingly suspect in and of itself—in terms of the validity of its composition and manner of recordation. Petitioner never was given an opportunity to examine the original tape for alterations or tampering.

The admission of the Brodsky tape in evidence, we submit, represents an "indiscriminate use" in a federal criminal trial of the fruits of a surreptitious eavesdropping device as to which this Court expressed concern in its recent decision in *Berger* v. *New York, supra* (388 U. S. at p. 56). We most respectfully urge that in the exercise by this Court of the self-imposed burden of "heavier responsibility" as to "supervision of the fairness of procedures" (*Ibid.*) in relation to such devices, the judgment of conviction below must be vacated. The use of the tape recording in evidence at petitioner's trial violated fundamental concepts of due process and raises questions of first impression in connection with the use of tape recordings, which warrant clarification for the guidance of the lower federal courts.

Suspect nature of the tape recording and evidence as to tampering

The Court of Appeals recognized in its opinion that "tape recordings are susceptible to alteration" (A22). The actions of Mrs. Fuller in this regard were highly suspicious. She started with one reel of tape and physically fragmented it (266a-88a). She changed reels around (276a). She cut off a portion of the "Brodsky" tape, because in her view it was "irrelevant", although she never produced the excised part (266a-69a). A portion was "over-taped", thus, deliberately destroying that portion of the original recording (161a, 198a, 280a-81a, 385a-86a). She admitted that she knew how to blot out, erase, overtape, and retape an entire recording—in particular, with the use of two machines which were available to her at all relevant times (198a-200a, 394a-95a).

For some inexplicable reason the two machines failed to pick up conversations until August 24, within approximately two hours after she had been interviewed by the FBI (186a-87a, 195a-96a, 237a-40a, 264a, 273a-74a, 306a). Moreover, she allegedly made no mention of the tape recording; and did not produce it until September 10 (149a, 300a, 310a), although in frequent touch with the Government during the preceding two weeks (145a-46a, 300a, 307a-08a).

The evidence also demonstrates that Mrs. Fuller controlled the quality and audibility of the tapes by subjecting them to background noises at will, such as the air conditioner (277a); or by turning her head and talking in low tones (see 279a); or, obviously, by going into a different room (279a). She could selectively render inaudible that which she did not wish to have preserved (see also 384a-87a, 320a). Furthermore, there were admitted changes of voices in the tape allegedly attributed to petitioner (322a). Obviously, this could have been easily accomplished by maneuvering the tape, overtaping, splicing and dubbing in.

The strange and unusual conduct of the FBI in failing to authenticate the tape produced and in making an adulterated copy

Mrs. Fuller made two appearances with the tape at the FBI—the first being on September 10, and the second approximately one week later (149a, 300a-01a). The sequence of events which followed thereon are truly incredible.

First, as to elementary standards of authenticity, the FBI having the tape in its physical custody upon two separate occasions, did absolutely nothing in order to determine whether the tape was authentic and free from tampering or alteration. Specifically, the original tape produced was never measured (312a, 315a). They did not examine every part of the tape (316a)—at least to ascertain whether any splices were evident. No scientific device was utilized in order to test the tape and determine whether anything had been done with it (317a). The quality of the tapes was not compared (312a). Moreover, sufficient inspection and examination was not even made in order to determine whether an original or a copy had been produced by Mrs. Fuller (317a).

Secondly, with all the technical facilities at its command, the FBI did not even attempt to make a proper copy. Instead, they used a primitive method for copying the tapes. They simply set up two recording machines in a room, played the tape brought by Mrs. Fuller on one, and held the microphone from the second machine against the speaker of the first machine (300a-01a). This was apparently done, moreover, with a fan operating in the background (301a). The result was to superimpose background noise on the tape and increase its general inaudible quality (301a). On the second occasion, when Mrs. Fuller came with the tape, although they could not make a copy for the alleged reason that the equipment did not work (301a, 315a), they again failed to keep the tape. The

FBI, after first adding additional background noises, then proceeded to make a second copy of the tape by running it through a filter for the purpose of allegedly removing background noises (301a, 316a)—but did so without knowing whether any low-pitched voices would thus be removed from the recording (317a).

This third copy was the one ultimately admitted in evidence (302a, 316a). It was secondary evidence which could in no way measure up to the original in that (a) it was adulterated by means of the copying process; and (b) because the extent of the admitted tampering by the maker could no longer be determined by physical and scientific examination of the tape.

Loss of the original tape by reason of the negligent and reckless conduct of the FBI

The situation involving the "Brodsky" tape was made even more serious, by the loss of the original tape as a result of the gross negligence of the Government. When Mrs. Fuller came to the offices of the FBI, the Government could have obviously arranged to retain the original, which she produced, whether by agreement or through the use of process. It did not use process for some unexplained reason; and instead of keeping the original and returning the copy to the witness, it did the opposite (189a-93a, 286a, 289a, 301a, 314a).

Then, after improperly letting the witness keep the original tape, the Government failed to take adequate measures to ensure its preservation and production at the time of trial. An arrangement was made between Mrs. Fuller and the FBI that the original tape would be deposited in a safety deposit vault (191a-93a, 205a, 289a, 314a). Mrs. Fuller was not to be allowed to remove the tape from the safety deposit vault unless the bank notified the FBI and the removal was done with FBI permission (314a); and she was supposed to confer with FBI Agent Goss before

taking the tape out (324a). The arrangement, according to Goss, was to be one of "dual control" (314a).

Instead of effectuating this "dual control", Goss testified that the FBI did not actually go to the bank with Mrs. Fuller (314a)—although she curiously claimed to have been "taken with the FBI" (Goss) to the strongbox for deposit of the tape (192a). There is no evidence, moreover, that the FBI even communicated with the bank to ensure the arrangement. They did not even check whether the tape was put into the vault in the first place. They did not arrange for a duplicate key (323a-24a). In fact, Mrs. Fuller testified that the FBI rented the box and gave her the 2 keys (205a). Although Goss testified the FBI did not go to the bank (324a), his only excuse was that Mrs. Fuller was supposed to confer with him before taking anything out of the vault (324a).

We maintain that this was nothing more than an invitation to the Government witness, Mrs. Fuller, to lose the original tape. And "lose" it she did.

She removed it from the bank—why no one knows—and put the tape in a drawer in her apartment (289a). When she took it out to bring to her attorney's office for turning over to the FBI, although no one had had access to it but Mrs. Fuller and the FBI, it was blank (192a-93a, 204a, 286a, 289a, 316a). This is the equivalent of deliberate destruction of the original tape.

The breach by the government of its duty to preserve original evidence and the resulting denial to petitioner of the opportunity to examine and inspect the original tape, constituted a deprivation of constitutional right

In *U. S.* v. *Consolidated Laundries* (291 F. 2d 563 [2nd Cir., 1961]), the Second Circuit announced the rule, of constitutional import, which it failed to apply in the case at bar, that the Government has an "absolute duty" to

"keep the evidence of which it was custodian in such manner that it would be available for use upon the trial by all parties." (291 F. 2d at p. 570; accord: *U. S.* v. *Heath*, 147 F. Supp. 877 [D. Hawaii, 1957], aff'd 260 F. 2d 623 [9th Cir., 1958]; see also *Sylvania Electric Products, Inc.* v. *Flanagan*, 352 F. 2d 1005, 1008 [1st Cir., 1965]; *People* v. *King*, 225 P. 2d 950, 101 Cal. App. 2d 500 [1950]). The Government's duty is breached if the original evidence in its possession or control is lost or destroyed, whether by reason of its negligence or deliberate act. (See e.g. *U. S.* v. *Consolidated Laundries Corp., supra; U. S.* v. *Heath, supra*, 147 F. Supp, at pp. 878-9; *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842, 846 [4th Cir., 1964]; *Thomas* v. *U. S.*, 343 F. 2d 49, 53 [9th Cir., 1965]).

The conduct of the FBI in the case at bar constituted a reckless disregard and breach by the Government of this duty to preserve original evidence. The prejudice resulting to petitioner was real. As a result of the Government's failure to preserve the original tape recording, he was precluded from determining whether there was tampering and obliteration of the tape, which could only be done upon physical possession and access to the original in court.

When dealing with an instrumentality so highly susceptible to tampering as a tape recording, and where evidence of the tampering is unlikely to be preserved upon a copy, the denial to a defendant of the opportunity to examine the original is a denial of his right to a fair trial and due process of law.

Significantly, the Court of Appeals conceded that the "Government's procedures for insuring the safekeeping of the tape were hardly adequate" (A24). We assume that "hardly adequate" is a euphemism for "inadequate"; and the safekeeping by the FBI could not be inadequate unless the Government was under some duty. The failure of the Government in its duty adequately to preserve the

tape, is essentially the same as the breach of duty which obtained in *Consolidated Laundries* and *Heath, supra.*

The holding of the Court of Appeals that the Government could not compel Mrs. Fuller to surrender the tapes (A24), cannot go unchallenged. In the first place, she could as well have kept a copy and given the Government the original. The relationships between Government officials and Government witnesses, especially when the Government's witness is in peril of being prosecuted for crime herself, is one that requires the closest scrutiny by appellate courts. We respectfully suggest that it is a dangerous precedent to tell prosecutors, as the court below did, that they have no duty to use court process to preserve evidence that may be helpful to a defendant. The process is readily available and should be used, and this should be made the rule in federal prosecutions.

The decision of the Court of Appeals constitutes a revival of the discredited "silver platter doctrine", effectuated in the guise of the best evidence rule

The Court below failed to acknowledge the constitutional implications of the issue presented, viewing the matter instead as a best evidence question (A22, 24). The proposition which we urge, although it transcends the best evidence rule, is somewhat analogous. Thus, it is generally stated that in order to lay a foundation for the introduction of secondary evidence, it must be first established that the original was lost or became unavailable *"otherwise than through the fault of the proponent of the testimony"* (*Sylvania Electric Products, Inc.* v. *Flanagan, supra,* 352 F. 2d at p. 1008; emphasis supplied). So, too, as it is reasoned in the context of the best evidence rule, production is required in order that the party might "examine the * * * original" (*Toho Bussan Kaisha Ltd.* v. *American Pres. Lines, Ltd.,* 265 F. 2d 418, 423 [2d Cir., 1959]). It is only by such physical examination and inspection that one can learn

"legitimate objections" to its "significance" (*U. S.* v. *Alexander,* 326 F. 2d 736, 742 [4th Cir., 1964]).*

The Court of Appeals acknowledged that Mrs. Fuller "was at fault in the loss of the original" (A24). Yet, the mysterious and unexplained disappearance of the tape as a result of Mrs. Fuller's "fault", with all its untoward ramifications, was excused by the Court on the ground that the Government and not Mrs. Fuller "was the proponent" (*Ibid.*).

What the Court of Appeals has actually done is to revive the totally discredited "silver platter" doctrine. Can it still be held that the taint which attaches to evidence unconstitutionally seized and handed over by a state official in a federal criminal prosecution is exorcised by viewing the federal government and not the state officers as the proponent of the evidence? But in any event, the untenability of the labeling process indulged by the court below is clearly pointed up by its recognition that "the Government's procedures for insuring the safekeeping of the tape were hardly adequate" (A24). Thus, even under the narrow view adopted by the court, the one occupying the technical status of the "proponent" was not free from taint or fault in connection with the disappearance of the original.

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* The Court of Appeals in its opinion relied on *U. S.* v. *Manton* (107 F. 2d 834, 835 [1939]), which involved recordacks of checks kept in the regular course of business by a bank. Reliance upon the holding therein, is hardly authority for the modern problem of the use in evidence of a tape recording so highly susceptible of alteration.

The decision below is the first case permitting the use of a copy of a tape recording, absent a concession, where the original is not in court. It creates a new rule of general application relating to the use of eavesdropping devices which deserves the attention of this Court

The decision below in sanctioning the admission in evidence of the Brodsky tape, also goes beyond the practice in such matters by other Circuit Courts of Appeal. As indicated by the only reported cases, decided by the Fourth, Fifth, Seventh and District of Columbia Circuits, the use of a copy of an original tape recording has been permitted only where (1) the original was produced in court, or (2) its authenticity was conceded by the defense (*Johns* v. *U. S.*, 323 F. 2d 421, n. 2 [5th Cir. 1963]; *U. S.* v. *Madda*, 345 F. 2d 400, 402-3 [7th Cir., 1965]; *U. S.* v. *Hall*, 342 F. 2d 849, 852 [4th Cir., 1965]; *Monroe* v. *U. S.*, 234 F. 2d 49, 56 [D. C. Cir., 1956]; Annotation, 58 ALR 2d 1024, 1044).

Neither of these prerequisites were satisfied in the case at bar. Thus, the Court of Appeals for the Second Circuit has now gone beyond existing doctrine in the other Circuits. Significantly, in the only case on the point cited in the court's opinion (A22), *Johns* v. *U. S.*, *supra*, the copy was *conceded by counsel* to be an "accurate re-recording of the wire." The original was also actually in court (See 323 F. 2d at p. 421 n. 2).

As we advance into the field of recording and electronic transcription, sharp tools are being put into the hands of the unscrupulous. A frame-up based on doctored "scientific" recording is loathsome to the administration of justice. The safeguards lie not in the jury's ability to speculate, but in the insistence upon minimal safeguards of authenticity as preliminary to admissibility.

We accordingly request that this Court in the exercise of its self-imposed responsibility to supervise, "the fairness of procedures" in connection with the use of eavesdropping devices should impose standards for admis-

sibility embracing the following: (1). The Government should be required to produce the original in court. (2). If the original is unavailable and secondary evidence is profferred instead, the Government should be required to demonstrate that it was without fault in the loss or destruction of the original; and that it subjected the original to proper and careful physical examination, thereby insuring that it is free of taint. Such examination should consist, at a bare minimum of (a) measurement of the tape to see that nothing has been cut off; (b) examination for splicing; and (c) examination for overtaping and the extinguishment of underlying conversation.

The Court of Appeals, in reliance upon the testimony of Mrs. Fuller, Brodsky and Goss, assumed that there was "very substantial evidence" supporting the authenticity of the copy of the lost tape recording (A. 23). The reason a tape recording is permitted in evidence at a trial—with its "persuasive, sometimes a dramatic, impact on a jury" (A. 22)— is because it purports to be an absolutely accurate transcription of a conversation. To say, therefore, that the tape may be authenticated on the basis of witnesses' general recollection alone is an inconsistency in itself—amounting to no more than lifting one by his own boot straps.

The emphasis of the court on the fact that only matters elicited by the defense which reflected upon authenticity resulted from cross-examination (A23) is to miscast the burden. The burden is upon the Government to prove authenticity by producing the original in court; and it is not for defendant to disprove authenticity in the absence of the original without ever having had physical access thereto. Without the original tape being in the courtroom, scientific measurement and analysis to determine alteration was actually impossible. If the decision below stands, there is literally no safeguard for a defendant against tampering with an original tape recording that is never produced.

III

The secret tape recordings were subject to discovery by petitioner, as a matter of right. The Government had an affirmative duty to disclose their existence in advance of trial.

Defendant moved before trial for an extensive bill of particulars and discovery and inspection pursuant to Rules 7(f) and 16 (20a-29a). On the motion, petitioner did not directly request production of the tape recordings, or any statements made by him in the possession of the Government. He knew that he had made no statement voluntarily; and he did not know of the secret recordings made by Mrs. Fuller without his knowledge.

This Court in promulgating the revisions of the Federal Rules of Criminal Procedure, ordered, in relevant part, that they "shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced and so far as just and practicable *all proceedings then pending*" (383 U. S. 1089; emphasis supplied).

We maintain, under the new Rule 16(a), that (1) the Government had an affirmative duty to come forward and produce the tapes before trial for discovery by petitioner; and that (2) petitioner's right to such discovery was not discretionary with the trial court. The Court below ruled to the contrary on both of these points (A24-26), which are important matters of general application in the administration of the new Rule 16(a).

Imposition of a duty upon the Government to come forward in advance of trial and disclose its possession of surreptitiously made recordings of a defendant's statements, is consistent with the provisions of new Rule 16(a)*, as well as the current trend towards full disclosure.

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* The Rule contemplates that a defendant may not be able to specifically request a statement procured by means of a surreptitious tape recording. Thus, the reviser's comments on Rule 16(a) state, in relevant part, that "The defendant is not required to designate, because he may not always be aware that his statements or confessions are being recorded."

evidenced by the decisions of this Court (See e.g., *Dennis* v. *U. S.*, 384 U. S. 855, 870 [1966]). Even before the advent of the new Rule 16(a) the discovery of statements by a defendant was regarded by this Court to be "the better practice". (*Cicenia* v. *La Gay*, 357 U. S. 504, 511 [1958]) The decision in *U. S.* v. *Nolte* (39 F.R.D. 359 [D.C.N.D. Cal., 1965]), holding that tape recordings of conversations in the possession of the Government are subject to pre-trial discovery was cited with approval in the *Dennis* case, *supra* (384 U S. at p. 871, n. 17).

The citation by the Court of Appeals of *U. S.* v. *Murray*, 297 F. 2d 812, 820 (2nd Cir.) *cert. denied* 369 U. S. 828 (1962) and *Shores* v. *U. S.*, 174 F. 2d 838, 843 (8th Cir. 1949), holding to the contrary, reflects an undaunted adherence by it to discredited doctrine.

The Court of Appeals reasoned that petitioner was not prejudiced by the failure of the Government to come forward in advance of trial with the tape recordings, since counsel was afforded two or three days during the course of trial (over a non-business weekend) in order to listen to the tapes after their surprise identification on the first day of trial (A26). Such reasoning, if sustained, is to defeat the entire concept of pre-trial disclosure, which imports adequate opportunity to prepare in advance of trial.

The advent of the new Rule 16(a) on July 1, 1966, nine days after the Government submitted to pre-trial disclosure (its bill of particulars being served on June 23) cannot excuse the failure of the Government to come forward. It would have been a futile gesture for petitioner to make a further motion after July 1 (A25-26) as the Court of Appeals suggested in its opinion. Petitioner did not know of the existence of the tapes until the actual commencement of trial five days later on July 6.

The further holding of the Court of Appeals that the matter of discovery of the tapes was discretionary under the new rule (A25), hardly comports with its purpose, the

intention of the revisers (see 39 F.R.D. 175, 176) or with the implications of the *Dennis* case, *supra*, as well. To leave the matter to the discretion of a District Judge sitting in a criminal motion part is to permit the predeliction of the particular Judge on such matters to control whether relief is granted or not. No guide lines are given for the exercise of the so-called "discretion" and there is normally little information available to the District Judge in the pre-trial procedure. To construe the rule as discretionary is to make for non-uniformity in its application—an undesirable result. We submit that the new Rule 16(a) was intended to give a defendant discovery of his own recorded statements as a matter of right.

IV

Petitioner's surreptitiously taken statements were subject to Fourth and Fifth Amendment protection.

In addition to the Brodsky tape of the conversation of August 25, 1965, Mrs. Fuller continued surreptitiously to record conversations with petitioner, particularly during the latter part of September through November 1965, which were also admitted in evidence (Exhibits 54, 57 and 65; 154a-57a).

We maintain that there was sufficient in this record to show that at the time these recordings were made (September through November and subsequent to the "Brodsky" tape), Mrs. Fuller was acting as an agent of the Government, Knohl was the target of investigation, and the Government already had sufficient evidence for a conviction.

On September 3 and 9, Mrs. Fuller was interviewed by the FBI. On September 10 and 17 she appeared at the FBI office with the Brodsky tape. Mrs. Fuller at one point did not remember whether she told Goss that she was going to continue to tape conversations she "would have with Mr.

Knohl" (205a). At another point, she in fact stated that she "might have" told the FBI that she was continuing to tape conversations (285a). In any event, she did continue to make recordings into the months of October and November.

Superimposed upon the foregoing is the testimony of Mrs. Fuller as to her dealings with the FBI. "Since the FBI came to me at the Bankers Trust" (on August 24), she testified, "I kept giving Mr. Armstrong all the papers" (175a). On the Brodsky tape she dubbed in the remark, by overtaping, that she was deliberately making the recording for the express purpose of turning it over to the FBI—allegedly to demonstrate her innocence but admittedly to inculpate Knohl (161a, 284a).*

The recent decision by this Court in *Berger* v. *New York, supra,* indicates that conversations of individuals, even if not made within the confines of their home or office, are now subject to Fourth Amendment protection, requiring that a search warrant, particularizing the conversation sought to be surreptitiously overheard, be obtained. We believe that the necessity for a search warrant as a condition precedent to the eavesdropping (September to November) was particularly indicated in the case at bar where petitioner was the undisputed target of an investigation and the Government already had in its possession sufficient evidence to indict and convict. Before the tapes

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* The evidence would in fact indicate that Mrs. Fuller was acting as a Government agent at an earlier stage. Thus, on August 17 or 18, she was approached by the Secret Service and immediately hired a lawyer (141a, 248a-52a, 259a-60a, 297a-98a). On August 24, the FBI interviewed her at the bank (140a, 258a-59a, 300a) and immediately thereafter a tape recording was made. On August 25, she was served with a Grand Jury subpoena (143a) and a second tape was made. On August 26, she spent the entire day being interviewed at the Courthouse and upon her return another conversation was taped (145a-46a, 193a-94a). An FBI agent also visited her apartment on that day (185a, 206a). On August 27, she testified before the Grand Jury and recording continued thereafter.

in question were made, the FBI already had the "Brodsky" tape on September 10, and Mrs. Fuller had already testified before the Grand Jury ("telling the truth" [146a]) on August 27, after extensive interview by the Government on August 26. We, therefore, submit that the eavesdropping was in violation of the Fourth Amendment.

We believe that the extraction of incriminating statements from petitioner, in light of the foregoing circumstances, by means of guile (Cf *Gouled* v. *U. S.*, 255 U. S. 298 [1921]), was also a violation of his Fifth Amendment rights.

We accordingly maintain that, at the very least, the issue of whether the surreptitious tape recordings, or any of them, had been made by Mrs. Fuller while she was acting on behalf of the Government, should have been presented to the jury for determination.

Petitioner, in fact, requested a charge (Request to Charge No. 10), as follows:

> "10. If you find that Mrs. Fuller was acting in such capacity (as an agent, employee or on behalf of the Government), then any alleged admissions claimed to have been procured by her or made to her by Knohl after her statement to the FBI and the United States Attorney on August 26, 1965, must be disregarded and may not be considered by you."

The court refused the proposed instruction (402a). We submit that this was error; that a determination by the jury of the issue was constitutionally required in effectuation of petitioner's rights under the Fourth and Fifth Amendments.

CONCLUSION

Under all the circumstances hereinabove set forth, it is respectfully prayed that the writ of certiorari should be granted.

Respectfully submitted,

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